


5-15-1985

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Recommended Citation

Steven G. Churchwell *The Federal Antitrust Implications of Local Rent Control: a Plaintiff's Primer*, 12 Pepp. L. Rev. 4 (1985)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol12/iss4/2>

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The Federal Antitrust Implications of Local Rent Control: A Plaintiff's Primer

STEVEN G. CHURCHWELL*

The proliferation of rent control laws in many California cities has led to a furious debate concerning its legal, economic, and social consequences. Leading scholars believe that rent control only exacerbates existing housing shortages and excludes the poor, the minority and the elderly from scarce rental housing. This article sets forth the proposition that the fixing of rent ceilings by a local government violates the federal antitrust laws and can be invalidated in federal court.

I. INTRODUCTION

Rent controls in some form have existed in this country for several decades.¹ The recent tenants' rights movements in places such as Santa Monica, California, however, have produced much more restrictive rent control laws² with a corresponding determination by landlords to find legal means to overturn or weaken these measures.³ One cause of action that has been discussed often but pursued only recently is a federal lawsuit alleging antitrust violations.⁴ Only since 1982 has a majority of the United States Supreme Court allowed local governments to be sued in antitrust.⁵ The specter of treble damages

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1. New York City first passed a rent control program in 1942 as a "temporary" measure. Dienstfrey, *The Politics of Rent Control in the United States: A Program at the Yellow Light*, in RENT CONTROL MYTHS & REALITIES 5 (1981).

2. Santa Monica has "the nation's toughest and most controversial rent-control law." L.A. Times, Apr. 8, 1984, (Metro) at 1, col. 1.

3. "Santa Monica apartment owners consider rent control an anathema. Citing recent court decisions that removed the rent control board's authority to impose fines and set its own budget, they say they are even more determined to overturn the law." *Id.* at 1, col. 4.

4. The Clayton Act of 1914 allows a private party to enforce the antitrust laws and recover treble damages. 15 U.S.C. § 15 (1982).

5. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). See discussion *infra* notes 115-65 and accompanying text. Actually, in 1978, a plurality of the Court had agreed that cities did not enjoy antitrust immunity coextensive with

has led some to believe that either Congress,⁶ the courts, or state legislatures will eventually provide protection from Sherman Act⁷ liability for local governments.⁸

There is little doubt that a state legislature could provide municipal immunity from Sherman Act liability by passing a statute that "clearly articulated and affirmatively expressed"⁹ a state policy in favor of rent control.¹⁰ What is unclear is whether an activist court could provide state action immunity by finding such a policy expressed in housing legislation, for example, or even in other court decisions.

The California Supreme Court did not reach the immunity issue in *Fisher v. City of Berkeley*,¹¹ although it did address whether the Sherman Act preempted the Berkeley, California rent control ordinance. During briefing by the parties and amici curiae, the California Supreme Court by letter asked counsel to address several questions regarding, inter alia, the *Noerr* doctrine,¹² "inter-enterprise" conspiracies,¹³ and traditional rules of liability.¹⁴ The court's opinion in *Fisher* is devoted in large part to the antitrust question, but because the court decided that the plaintiffs could not demonstrate that the ordinance unreasonably restrained trade,¹⁵ the court limited its discussion to a review on the rule of liability.¹⁶

Because of the *Fisher* court's rejection of both the per se illegality and Rule of Reason tests, its discussion of the Sherman Act's application to the rent control law can be considered a curiosity. Neverthe-

that of the states. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

6. Congress has acted to provide such protection with the passage of "Local Government Antitrust Act of 1984." See *infra* notes 186-88 and accompanying text.

7. 15 U.S.C. §§ 1-7 (1982).

8. See, e.g., Civiletti, *The Fallout From Community Communications Co. v. City of Boulder: Prospects For A Legislative Solution*, 32 CATH. U.L. REV. 379 (1983).

9. See, e.g., notes 136-39 and accompanying text.

10. It is an open question as to whether the policy would have to clearly sanction the *anticompetitive effects* of rent control or merely legislate on the subject. See, e.g., *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (June 11, 1984) (Sherman Act immunity afforded city even though state legislature did not approve anticompetitive result of authorized waste treatment).

11. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984). Defendants argued that the necessary state policy did exist in California legislation, evidenced by the language in Health and Safety Code sections 50003 and 50005, entreating local governments to assist in providing a "decent home and suitable living environment for every California family." *Id.* at 714, 693 P.2d at 315, 209 Cal. Rptr. at 736 (Lucas, J., dissenting) (quoting CAL. HEALTH & SAFETY CODE §§ 50003, 50005 (West 1979)).

12. See *infra* notes 85-97 and accompanying text.

13. *Id.*

14. See *infra* notes 84-96 and accompanying text.

15. See *infra* notes 100-07 and accompanying text.

16. See Letter from Supreme Court of California to counsel in *Fisher* (Feb. 15, 1985) (requesting additional supplemental briefs).

less, the decision is discussed in this article because it is the court's very avoidance of the traditional rules of liability that provide hope to plaintiffs attacking a rent control ordinance in federal court.

Until this area of the law is settled by the courts, there are some established principles that can provide guidance to one bringing suit against a municipality for violating the antitrust laws through imposition of rent controls. This article will address the issue of whether the Sherman Act provides a viable avenue of attack against existing rent control laws. For the benefit of those who have little or no background in antitrust law, this article will examine basic antitrust principles and how practitioners may apply them.

II. THE ANTITRUST LAWS IN GENERAL

A. *Background of the Sherman Act*

The Sherman Antitrust Act¹⁷ was passed by the United States Congress in 1890 and was designed to prohibit restraint of trade¹⁸ and monopolization of markets¹⁹ in interstate commerce. Even though the legislative history of the Act indicates the desire of Congress to merely supplement state antitrust laws,²⁰ the predictable broadening of the federal commerce power by the United States Supreme

17. 15 U.S.C. §§ 1-7 (1982).

18. Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

19. Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. § 2.

20. The legislative record from the House states: "Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority." H.R. REP. NO. 1707, 51st Cong., 1st Sess. 1 (1890).

Court²¹ led to the inclusion of many wholly intrastate activities within the net of federal antitrust liability.²² The effect of these decisions was to leave many states open to federal antitrust liability due to the Court's all-encompassing view of interstate commerce.

Eventually, this led in 1943 to a judicially-created²³ immunity for states known as the "state action doctrine."²⁴ This ironclad protection given to states did little to reassure municipalities²⁵ that they would be given the same immunity from the potentially devastating treble damage awards provided for in the Clayton Act of 1914 for violations of the antitrust statutes.²⁶ Local governments' worst fears were realized in the landmark decision of the United States Supreme Court in *Community Communications Company v. City of Boulder*.²⁷ In *Boulder*, a majority refused to equate municipal activity with state action, finding that a state could provide antitrust immunity to local governmental entities only by a "clearly articulated and affirmatively expressed state policy" in favor of the anticompetitive activity.²⁸

Thus, disgruntled bidders for city contracts and franchises, landlords subject to rent controls and, potentially, numerous other plaintiffs were now armed for battle in the federal courts. The only question remaining was the limit of the local government's newfound liability.

B. Judicial Application of the Sherman Act

The aim of Congress in enacting the Sherman Act of 1890 was to

21. See, e.g., *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

22. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976), *reh'g denied*, 104 S. Ct. 512 (1983).

23. Statutory exemptions from the antitrust laws are quite common. For example, 15 U.S.C. § 1012(b) (1982) exempts state regulation of insurance companies from any "Act of Congress."

24. The seminal decision that set forth the state action doctrine was *Parker v. Brown*, 317 U.S. 341 (1943). For a detailed discussion of what has become known as "Parker immunity," see *infra* notes 115-44 and accompanying text.

25. See generally Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981).

26. The Clayton Act encompasses 16 sections in title 15 of the United States Code. Section 15 provides in part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982).

27. 455 U.S. 40 (1982). For a discussion of the *Boulder* decision, see *infra* notes 133-38 and accompanying text.

28. 455 U.S. at 52.

promote "full and free competition" in the marketplace.²⁹ The United States Supreme Court stated in 1958 that

[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.³⁰

This policy has, as could be expected, been the subject of varying degrees of judicial interpretation and enforcement, but the basic resolve of the federal courts to promote unfettered competition has remained unchanged through the years. To understand why local rent controls violate the Sherman Act, one must first understand the basic rules regarding the courts' application of sections one and two of the Act.

1. The Rule of Reason

For the first twenty years, the courts interpreted the Sherman Act quite literally. "Every" restraint of trade or monopoly was condemned under the antitrust laws. In *United States v. Trans-Missouri Freight Association*,³¹ the United States Supreme Court held that "[t]o say . . . that the [Sherman] Act excludes agreements which are not in unreasonable restraint of trade . . . is substantially to leave the question of reasonableness to the companies themselves."³²

This remained the law until 1911 when the Court decided *Standard Oil Company of New Jersey v. United States*.³³ The justices decided that the "standard of reason" applied to restraints of trade or attempts to monopolize and thereby adopted the Rule of Reason.³⁴ Only *unreasonable* restraints of trade or monopolies have been condemned since *Standard Oil*.³⁵

29. See S. 344, 50th Cong., 2d Sess. § 1 (1888); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("the policy unequivocally laid down by the Act is competition"). For an excellent treatment of the legislative history of the Act, see Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

30. 356 U.S. at 4.

31. 166 U.S. 290 (1897).

32. *Id.* at 332.

33. 221 U.S. 1 (1911).

34. *Id.* at 59-62. The Court's adoption of the Rule of Reason was lambasted by Justice Harlan as an act of judicial legislation. *Id.* at 87-88 (Harlan, J., concurring in part and dissenting in part). One interesting note is that adoption of the Rule of Reason was superfluous in the *Standard Oil* decision because the huge trust before the Court clearly constituted an unreasonable restraint of trade. See Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 158 (1947).

35. See *Lawson v. Woodmere*, 217 F.2d 148, 151 (4th Cir. 1954). Certain antitrust activity is deemed "unreasonable per se." See *infra* notes 46-52 and accompanying text.

The Rule of Reason has been subject to many deviations from the strict standard of competition in its application by the Supreme Court over the years. The Court in *Standard Oil* failed to provide any guidance concerning the factors that should be considered in determining which monopolies or restraints of trade were reasonable. Eventually Justice Brandeis, in writing for the majority in *Board of Trade v. United States*,³⁶ set forth a clear articulation of the analysis required to apply the Rule of Reason:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.³⁷

This analysis appeared to bring social benefits of restraints of trade into the balance. This was confusing because the *Standard Oil* Court had made it clear that once an arrangement substantially restricted competition, nothing more would have to be proved to establish a violation of the antitrust laws.³⁸ Therefore, the deviation in *Board of Trade* could be considered an anomaly because of the decision's reliance on noncompetitive factors. However, later decisions also considered social factors in rejecting antitrust claims.³⁹

Nonetheless, current Rule of Reason analysis would appear to be strictly limited to consideration of competition without a moral inquiry. For example, in *National Society of Professional Engineers v. United States*,⁴⁰ the United States Supreme Court rejected the argument of engineers that their canon of ethics prohibiting competitive bidding was reasonable since competition in bidding could result in a decrease in quality, with a corresponding danger to the safety of the public.⁴¹ The Court stated that the correct focus of inquiry was not a practice's reasonableness, but rather its "impact on competitive

36. 246 U.S. 231 (1918).

37. *Id.* at 238.

38. 221 U.S. at 65. The standard against which business practice was measured in *Standard Oil* was competition. The Court stated that the agreements there were:

clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made.

Id.

39. See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (exclusive sales agency contracts between coal producers and defendant upheld against backdrop of Great Depression's bankruptcies and decreasing wages).

40. 435 U.S. 679 (1978).

41. The Court deemed the engineers' defense a "fundamental misunderstanding of the Rule of Reason." *Id.* at 681.

conditions."⁴²

2. The Per Se Doctrine

Even though the courts' duty in enforcing the Sherman Act involves a relatively narrow question of law, *viz.*, the impact on competition of the alleged restraint of trade, the courts must, nonetheless, consider several factors before rendering a decision. These include: (1) the power of the defendant "in the relevant product and geographic markets,"⁴³ (2) whether there exist less restrictive alternatives to the restraint,⁴⁴ and (3) possible redeeming *economic* virtues of the restraint.⁴⁵

The complexity of this procedure, as well as the belief that some restraints are inherently evil because they always eliminate or reduce competition, led the Court to declare some arrangements illegal *per se*.⁴⁶ The breadth of the doctrine is apparent from the famous statement made in *United States v. Socony-Vacuum Oil Company*:⁴⁷ "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."⁴⁸ The Sherman Act's purpose was to allow the *market*, not the courts, to determine prices. Therefore, it was believed, the Rule of Reason could not be effective in areas such as price-fixing because the courts would have to set reasonable price levels.

Therefore, the *per se* doctrine clearly outlaws horizontal price-fixing.⁴⁹ The bipartite test utilized by the courts before invoking the *per se* rule is: (1) the presence of an anticompetitive effect on the marketplace involved,⁵⁰ and (2) the probability that maintenance of the restraint will lead to control of the market by the defendant.⁵¹

42. *Id.* at 688.

43. *Chisholm Bros. Farm Equip. Co. v. International Harvester Co.*, 498 F.2d 1137, 1143 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

44. *See Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

45. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972).

46. The *per se* rule is aimed at punishing horizontal restraints of trade under section 1 of the Sherman Act. *See generally* Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U.L. REV. 137 (1962).

47. 310 U.S. 150 (1940).

48. *Id.* at 223.

49. *See United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969).

50. *See, e.g., Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

51. *See, e.g., Fashion Originators' Guild of Am., Inc. v. Federal Trade Comm'n*, 312 U.S. 457, 467 (1941). Market control that leads to monopolization is the main target of the *per se* doctrine. *See* 1 E. KINTNER, *FEDERAL ANTITRUST LAW* § 8.3, at 369 (1980).

The imposition of rent controls by a municipality meets both parts of the test and is clearly a per se violation of the federal antitrust laws. The setting of a maximum price for a commodity is perhaps one of the clearest examples of price-fixing.⁵² The fact that rent control falls within the per se category, however, does not end the inquiry. Before examining a city's defenses to a section one violation, section two of the Sherman Act should be studied.

C. Monopoly Power

When one thinks of monopolies, perhaps the old Bell Telephone system comes to mind most readily. One's uneducated guess concerning what constitutes the offense of monopolization prohibited by section two of the Sherman Act⁵³ is probably not far from the mark. The test set forth by the Supreme Court in *United States v. Grinnell Corp.*⁵⁴ requires the presence of two elements: (1) the possession of monopoly power in the relevant market, and (2) the intent to acquire or maintain that power.⁵⁵ However, possession of "monopoly power" that violates section two necessarily involves a question of degree. Herein lies the difficult part of the application of the section. The quantum of power possessed by the defendant within the relevant market must be examined.⁵⁶ Moreover, it is unclear what type of conduct by the defendant will satisfy the intent requirement of the second part of the test.

The first part of the test, monopoly power, may be defined as the power to control prices or to unreasonably exclude competition.⁵⁷ Traditionally, courts have examined market share of the defendant in the relevant product and geographic markets.⁵⁸ Definition of these markets is of the utmost importance to the plaintiff, because the larger the market, the larger the defendant's share will have to be for the plaintiff to prove the existence of monopoly power.⁵⁹

("Those are the types of restraints which are most antagonistic to the underlying policies of the Sherman Act.").

52. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); see also Rahl, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect*, 19 U. CHI. L. REV. 837 (1952).

53. See *supra* note 19.

54. 384 U.S. 563 (1966).

55. *Id.* at 570-71. See also *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

56. See III P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 600b (1978). See also Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power As a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973).

57. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389 (1956). See also *American Tobacco Co. v. United States*, 328 U.S. 781, 806 (1946).

58. See, e.g., *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268, 279 (1934).

59. For example, in the often-cited decision of *E.I. du Pont*, 351 U.S. at 377, the Court found that du Pont controlled 75% of the cellophane market, but that the rele-

In attacking a rent control law, the plaintiff may attempt to prove the defendant's possession of monopoly power by *direct evidence*⁶⁰ of the control of prices (e.g., the relevant rent control law) or the exclusion of competitors (e.g., establishment of a rent control law board with exclusive power to adjust rents). More likely than not, however, the judge will require that evidence of the defendant's market power be presented. Hence, the following discussion.

1. The Relevant Markets

a. The Geographic Market.

The relevant geographic market for purposes of attacking a rent control law is the area included in the jurisdiction enacting rent controls (e.g., Los Angeles County or the City of Berkeley) and a surrounding area bounded by perhaps the general community. In other words, the relevant market includes the geographic area of effective competition.⁶¹ For example, an exclusive coastal city such as Santa Monica might compete for renters within only a small area, including perhaps Venice and Marina Del Rey. This is because it is much less desirable to live in neighboring West Los Angeles, and another neighboring area, Pacific Palisades, is almost exclusively made up of very expensive, single family residences.

The burden of proof rests on the plaintiff to establish a specified area as the relevant geographic market.⁶² Normally a "reasonable approximation" of the market will suffice.⁶³ The formula utilized by the courts is not susceptible to any easy test. In finding a rather small relevant geographic market, the United States Supreme Court opined in *United States v. Philadelphia National Bank*⁶⁴ that

vant market included all flexible packaging materials (e.g., aluminum foil). Therefore, the Court found no monopoly power because du Pont only controlled 17.9% of the larger, "relevant" market. *Id.* at 405.

60. "Even in the absence of empirical proof of market shares (usually the best indicator of monopoly power), the requisite power also can be demonstrated by evidence of the exercise of actual control over prices or exclusion of competitors." *Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1219 (9th Cir. 1977), *rev'd on other grounds*, 682 F.2d 830 (1982) (citation omitted). *See also* *General Communications Eng'g, Inc. v. Motorola Communications & Elec., Inc.*, 421 F. Supp. 274, 286 (N.D. Cal. 1976) (quoting *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8, 12-13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974)).

61. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-39 (1962); *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 988 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

62. *United States v. Empire Gas Corp.*, 393 F. Supp. 903, 909 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1976).

63. *See* *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 619 (1974).

64. 374 U.S. 321 (1963) (Clayton Act section 7).

[w]here, within the area of competitive overlap, the effect . . . on competition will be direct and immediate, . . . the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies . . ."65

In terms of monopolization of the rental housing market by a city that has imposed rent control, this means an area encompassing all of the tenants in an area to whom city landlords could expect to rent housing.

Apart from the vague outer limits of the market area, courts sometimes seem willing to go further and use a well-defined submarket.⁶⁶ A plaintiff would do well to argue that this submarket is restricted to the city itself. Thus, the relevant geographic market in an antitrust suit against the Santa Monica Rent Control Board would be Santa Monica alone. This is because, realistically, rent control has reduced the vacancy rate to the point where there is no competition for tenants at all, including those from outside the area. With no tenant movement, and the stranglehold on competition possessed by the city, the city itself would appear to be the relevant geographic market.

b. The Relevant Product Market.

The relevant product market may be defined as the market in which the defendant's goods or services compete.⁶⁷ The relevant product market is composed of all commodities reasonably interchangeable by consumers for the same use.⁶⁸ For example, a city defendant in an antitrust suit against a rent control law could argue that *all* housing, not just *rental* housing, would be the relevant product market. This argument would probably not carry much weight. There are few similarities between the high cost of a townhome in Santa Monica and the controlled rent for a similar apartment. Rent control itself creates a unique product. Also, because cities with rent control laws generally have a large percentage of rental housing,⁶⁹ even if all housing is declared the relevant product market, the city probably monopolized a large enough share (all rental housing) to constitute monopoly power for section two purposes.

To summarize, rent control could be found to constitute monopoly

65. *Id.* at 357, 359 (emphasis in original) (citations omitted).

66. See *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 456 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967).

67. *E.I. du Pont*, 351 U.S. at 395-96.

68. See *Brown Shoe*, 370 U.S. at 325. Besides interchangeability of use between the defendant's product and substitutes of competitors, the Court listed: (1) industry or public recognition of the submarket as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. *Id.*

69. Otherwise tenants do not have the necessary political power to enact a rent control law.

power under the test set forth in *United States v. Grinnell Corp.*⁷⁰ because the municipality itself could be considered the relevant geographic area, and the relevant product market would be rental housing over which the city has 100% control. Thus, only the intent requirement is left to be dealt with.

2. Intent to Monopolize

The second part of the offense of monopolization is intent to monopolize.⁷¹ The intent required is a "general" intent.⁷² The case law on this point is confusing and the language often misleading.⁷³ The simplest way to understand the requirement is to realize that the court utilizes evidence concerning the defendant's conduct to evaluate the anticompetitive nature of the alleged monopoly. The court is interested in *consequences*, not what the defendant set out to accomplish.⁷⁴

In the arena of rent control laws, the proof of intent should be quite simple to present. First, proof that the defendant intended to engage in the particular act would involve proving passage of the ordinance or initiative establishing rent control. Second, it must be proved that this act (not illegal in itself) resulted in acquisition of monopoly power by the defendant. This would be evidenced by language in the rent control law providing for a rent "freeze" or "rollback" and the raising of rents only under specified circumstances.

Basically, pleading a section two monopoly violation makes good sense for the plaintiff because there is no combination, contract, or conspiracy requirement as there is under section one of the Sherman Act.⁷⁵ Rent control laws give the city monopoly power in the relevant market; and the city willfully acquires that power through pas-

70. 384 U.S. 563, 570-71 (1966).

71. *Id.*

72. General intent can be defined as the intent to do the *acts* that result in a monopoly. See *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953). Specific intent is required to prove an *attempt* to monopolize under section 2 of the Sherman Act, but mere general intent is required where the monopoly is already in place. *Id.* To read section 2 as demanding any "specific" intent makes nonsense of it, "for no monopolist monopolizes unconscious of what he is doing . . ." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945), *quoted in* 345 U.S. at 626.

73. See 2 E. KINTNER, *FEDERAL ANTITRUST LAW* § 12.11 (1980).

74. See *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

75. See *United States v. Griffith*, 334 U.S. 100, 106 (1948), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984). See also *infra* note 78 and accompanying text.

sage of an initiative or ordinance. This constitutes illegal monopolization under the Sherman Act.

III. THE NEED FOR A "CONTRACT, COMBINATION, OR CONSPIRACY" UNDER SECTION ONE

It is interesting to note that of the seven questions addressed to counsel in the *Fisher v. City of Berkeley* case by the California Supreme Court in a letter requesting additional briefings, all but one dealt with various aspects of the Sherman Act, section 1, requirement of a "contract, combination, or conspiracy."⁷⁶ Along with a plea of *Parker* immunity,⁷⁷ municipal defendants will ground their defense upon this requirement.

Section one of the Sherman Act requires concerted action,⁷⁸ while independent action by a single entity or person may result in a section two monopolization violation. Thus, the following discussion

76. It is interesting to note that of the seven questions addressed to counsel in the *Fisher* case (in a letter from the California Supreme Court), all but one dealt with various aspects of the section one Sherman Act requirement of a "contract, combination, or conspiracy." Letter from clerk of the California Supreme Court Counsel in *Fisher* (Feb. 15, 1985) (requesting supplemental briefs concerning antitrust scrutiny of Berkeley rent control ordinance). The questions were:

1. If the alleged "contract, combination, or conspiracy" required to be proved under section 1 of the Sherman Act is viewed as having occurred among the named defendants, what effect, if any, should be given regarding the so-called "inter-enterprise" or "bathtub" doctrine? (See, e.g., Note, "Conspiring Entities" Under Section 1 of the Sherman Act (1982) 95 Harv.L.Rev. 661; Vanderstar, *Liability of Municipalities under the Antitrust Laws: Litigation Strategies* (1983) 32 U.Cath.L.Rev. 395, 401-403.)

2. If the alleged "contract, combination, or conspiracy" is viewed as having occurred between the named defendants and third parties (i.e., between the named defendants on the one hand, and the ordinance proponents and the voters on the other):

(a) What evidence in the record sheds light on the role of the initiative proponents in the enactment of the ordinance? Is there any evidence in the record indicating by what process the ordinance was placed on the ballot?

(b) What effect, if any, should be given the *Noerr* doctrine (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961) 365 U.S. 127) in relation to the "third parties' " conduct?

(c) Assuming *arguendo* that the "third parties' " conduct is protected under *Noerr* and its progeny, should the third parties' "privilege" vitiate the alleged "conspiracy" between the named defendants and the third parties?

(d) Can the legitimate acts of third parties in promoting and voting for rent control, together with the named defendants' actions undertaken pursuant to the third parties' conduct, be considered to constitute a "contract, combination or conspiracy" under section 1 of the Sherman Act?

3. Assuming *arguendo* plaintiffs can establish as a matter of law that on these facts a "contract, combination, or conspiracy" exists, and that the alleged restraint affects interstate commerce, should traditional rules of anti-trust liability govern this facial attack on the ordinance?

Id.

77. See *infra* notes 116-17 and accompanying text.

78. The legal distinction for Sherman Act purposes among a contract, combination, or conspiracy is negligible. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTI-TRUST § 109 (1977).

will address only the need for proving concerted action under section one and how to prove it in federal court.

A. *Evidence of a Conspiracy*

Proving that a conspiracy occurred to put rent controls into place in a city will be relatively easy. Courts require a low threshold of proof to meet this section one requirement. An express agreement need not be shown.⁷⁹ The United States Supreme Court stated in *Interstate Circuit, Inc. v. United States*,⁸⁰ that to establish a conspiracy under the Sherman Act it is sufficient to show "[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce" ⁸¹

The central issue is not whether a conspiracy to restrain competition existed, but whether the actors involved were: (1) both part of the same entity and thus incapable of conspiring under the "bathtub" doctrine,⁸² or (2) incapable of conspiring under the *Noerr* doctrine⁸³ because they were petitioning for government action. A plaintiff should not, however, neglect developing the legislative history of the ordinance or charter amendment. Discovery in this area will be crucial and every possible way to show a conspiracy should be explored without regard to the legal exceptions. The goal is to lead the finder of fact to the conclusion that two independent parties combined to eliminate competition in the relevant rental housing market.

B. *The Noerr Doctrine: Can It Eliminate the Existence of a Conspiracy for Sherman Act Purposes?*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁸⁴ the United States Supreme Court reviewed a case in which twenty-four railroads had engaged in an underhanded smear campaign against long-distance trucking companies.⁸⁵ The trucking companies' complaint alleged violation of the Sherman Act. The

79. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (enough that defendants contemplate concerted action and then conform to that arrangement).

80. 306 U.S. 208 (1939).

81. *Id.* at 227.

82. See *infra* notes 97-98 and accompanying text. For example, can a city conspire with a city council? Can a rent board conspire with the city?

83. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The defenses are discussed *infra* in notes 106-14.

84. 365 U.S. 127 (1961).

85. *Id.* at 129-30.

Supreme Court reversed both lower courts, finding no Sherman Act violation because "the railroads were making a genuine effort to influence legislation and law enforcement practices."⁸⁶ The Court reasoned that "the Sherman Act does not apply . . . [where] activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws."⁸⁷

The *Noerr* doctrine is limited in scope, but when it is found to apply, it can deliver a devastating blow to the plaintiff's case. There is little doubt that the fiercest battle in an antitrust suit against a rent control law will be fought here. Plaintiffs should emphasize several points in seeking to limit application of *Noerr* in the rent control context.

First, it should be remembered that the railroads' methods, though ethically indefensible, did not constitute a traditional boycott, price-fixing, or other recognized unlawful activity. Second, the goal of the railroads was favorable treatment by the government, and it has long been settled that seeking favoritism from a state government is protected.⁸⁸ Even if the railroads' primary objective was to harm their competitors through governmental action, the *Noerr* decision seems quite reasonable.

It seems clear that the Court did not intend, in granting broad protections to first amendment activity, to give a blanket exemption to political solicitation that results in blatant Sherman Act violations. It is plausible to theorize that the Court did not contemplate *Noerr* immunity for antitrust violations instituted by the government itself. *Parker*⁸⁹ immunity had been in place since 1943 for state governments, and *Noerr* involved a "commercial" defendant.⁹⁰ The constitutional concerns expressed in the *Noerr* decision could be protected entirely, and yet the government's *acting* upon the constituency's demands still subjected them to Sherman Act scrutiny. The *Noerr* decision clearly implies this result in stating that no Sherman Act violation exists "where a restraint upon trade or monopolization is the result of *valid* governmental action, as opposed to private action"⁹¹ The Court had no occasion to address the situation where a

86. *Id.* at 144.

87. *Id.* at 138.

88. *See Parker*, 317 U.S. at 350-52.

89. 317 U.S. at 341 (state government's rights to institute regulatory legislation which would operate only upon petition and referendum of the parties whose activities were to be regulated).

90. The Court has seldom dealt with the Sherman Act outside the business context. The Court stated in 1959, just two years before the *Noerr* decision, that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959).

91. 365 U.S. at 136 (emphasis added) (footnote omitted).

local government institutes price-fixing in the form of rent controls. One suspects that *Noerr* may be distinguishable in that context, even though the offending law was a result of lobbying, letters, and other activity protected by the first amendment. Even the reaffirmation in 1965 of the *Noerr* doctrine in *United Mine Workers of America v. Pennington*⁹² did not examine the government's conduct, but only the petitioner's.⁹³

In light of *Overton v. City of Berkeley*,⁹⁴ an antitrust action filed against the Berkeley rent control law on May 31, 1984, one federal district court's opinion on how the *Noerr* doctrine applies in the rent control context will likely be forthcoming.⁹⁵ For the present, the best course would be to examine several theories of proving a conspiracy to illegally restrain free competition in the rental market.⁹⁶

C. *The "Bathtub" Doctrine: Another Obstacle for the Plaintiff*

Before examining three methods to prove a section one violation of the Sherman Act, "contract, combination, or conspiracy," the "bathtub" exception should be mentioned. The "bathtub" concept inquires whether two related entities or persons are capable of conspiring with one another for purposes of the Sherman Act. For example, a corporation and its officer,⁹⁷ or a corporation and its wholly-owned subsidiary, cannot conspire with one another under section one of the Sherman Act.⁹⁸

In the realm of municipal governments with rent controls, one important issue is whether a city government, without involvement of private citizens, can violate the antitrust laws. Another issue is whether individual citizens, acting together to pass a rent control law by initiative, can be considered to have combined for Sherman Act purposes. Subsection two, below, addresses this point. The following discussion examines whether the city can be held to have conspired

92. 381 U.S. 657 (1965).

93. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670.

94. No. C843364SAW (N.D. Cal. filed May 31, 1984).

95. Defendant City of Berkeley filed an answer to the complaint on July 5, 1984. Discovery is being conducted by both sides. Berkeley presents an interesting *Noerr* issue because the tenants did not petition the city council to pass the original rent control law; it was a charter amendment passed *by initiative*.

96. See *infra* notes 99-114 and accompanying text.

97. See *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962).

98. 15 U.S.C. § 1 (1982). See *Copperweld*, 104 S. Ct. at 2731.

with unwilling landlords to restrain prices in the rental housing market.

1. A Municipal Government May Conspire Within Itself to Restrain Rent Levels

Because judicial recognition of municipal liability for violations of federal antitrust laws is a new phenomenon,⁹⁹ one must still look to the Sherman Act's application to businesses for interpretation of the various provisions. A very lengthy discussion of intraenterprise conspiracies was provided by the United States Supreme Court in *Copperweld Corporation v. Independence Tube Corporation*.¹⁰⁰ The Court held that the coordinated behavior of a parent company and its subsidiary falls outside the reach of section one.¹⁰¹ The rationale supporting the decision was that "a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design.'"¹⁰² The Court emphasized the need for concerted action to establish a section one violation and conceded that "the Sherman Act . . . leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization)"¹⁰³

The issue confronting the bold plaintiff, who is suing a municipality for instituting rent control, is whether a city can *within itself* conspire to violate section one of the Sherman Act. The answer is yes in only a limited number of situations.

For example, suppose one attacks a rent control ordinance passed by a city council. There may have been extensive lobbying by the public in favor of the ordinance,¹⁰⁴ but the city council adopted the law completely on its own. One issue is whether the Sherman Act should apply to acts of the individual commissioners who clearly "combined" to pass the law. The answer is probably no. The correct analogy there would be to a corporation's board of directors. Each individual director may have his own agenda with respect to price-competition, but the directors can only act *collectively* by voting. The courts do not find the section one requirement of a "contract, combination, or conspiracy" met merely because two directors decided to

99. See *City of Lafayette*, 435 U.S. at 389.

100. 104 S. Ct. at 2731.

101. *Id.* at 2741-42 (parent and subsidiary viewed as a single enterprise for purposes of section 1 of the Sherman Act).

102. *Id.* at 2742 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

103. 104 S. Ct. at 2744. City-wide rent control would appear to constitute a clear violation of section 2.

104. It is doubtful whether *private* meetings between individual council members and rent control advocates would be protected under the *Noerr* doctrine. Such meetings could also result in prosecution for violation of the "open meeting laws" found in most state codes. See, e.g., CAL. GOV'T CODE §§ 54950-54961 (West 1983 & Supp. 1985).

restrain trade.¹⁰⁵ Similarly then, the fact that a city council adopted rent controls by ordinance would not seem to constitute a combination or conspiracy among council members in the antitrust sense.

Perhaps a different situation exists where the city council has no real authority over rent control, because this power is delegated by law to an arbitrator¹⁰⁶ or independent board.¹⁰⁷ In that scenario, the board and the city council could have such differing goals and interests that each would qualify as a separate conspirator. For instance, the council and board could meet in a closed session to discuss withholding any rent increase for the following year. That would be enough to constitute a conspiracy to restrain price competition in the relevant rental market.

2. Tenants Conspiring with Each Other

A second theory is that tenants, in order to displace competition in the rental market, conspired with each other to pass rent control by ballot initiative.¹⁰⁸ That is, the tenants took matters into their own hands and decided among themselves, as individuals, to restrain competition by placing the law on the ballot and then approving it.¹⁰⁹ Tenants certainly have some goals in common, but should be considered individuals who could conspire with one another.

An interesting twist on this would be to plead, in the situation where council members met with tenants to discuss an initiative, that the tenants conspired with the city council to bring about rent control. The protections of the *Noerr* doctrine would not apply because the tenants were not exercising their first amendment rights to petition for governmental action but rather were only seeking advice and

105. See, e.g., *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 642-43 (9th Cir. 1969). A contrary rule would probably bring business to a grinding halt, unable to perform routine competitive functions such as marketing or advertising.

106. See WESTMINSTER, CAL., MUNICIPAL CODE § 2.63.090(B) (1980).

107. For example, Santa Monica and Berkeley, California, each have independently elected rent control boards. See Charter of the City of Berkeley, art. XVII, § 120 (1980); Santa Monica City Charter, art. XVIII, § 1803(d) (1979). In Santa Monica, the board has its own legal staff, budget power, and even a lobbyist.

108. Another argument that could be made is that the current tenant conspirators, in order to gain a competitive edge over future tenants, passed a rent control law that contains eviction controls and also lowers the vacancy rate. The result is that potential tenants seeking rental housing in the city must go elsewhere.

109. The *Noerr* implications of tenants passing a law are not examined in this section. The issue is whether a distinction should be drawn between a person or group petitioning the government for action and passing an initiative in lieu of governmental action.

aid in passing the law themselves.¹¹⁰

3. The City May Combine with Affected Landlords to Restrain Rent Levels

The idea that landlords constitute unwilling co-conspirators with the city is perhaps hard to accept at first glance.¹¹¹ Nevertheless, since an antitrust plaintiff suing a municipality necessarily must borrow from precedents involving businesses, this is one occasion in which he should do so heartily.

The "classic" vertical price maintenance arrangement often involves one party who, though unwilling, acquiesces in the anticompetitive desires of another party in a distribution ladder. For example, a manufacturer could refuse to supply goods to a wholesaler who did not require dealers to charge a minimum price for a product.¹¹² Also, a manufacturer could combine with an unwilling distributor to maintain a *minimum* price level. For instance, in *Albrecht v. Herald Company*,¹¹³ the United States Supreme Court stated that an independent newspaper carrier who refused to comply with the newspaper's lower advertised price "could have claimed a combination between respondent [the newspaper] and himself, at least as of the day he unwillingly complied with respondent's advertised price."¹¹⁴

The outcome of choosing this theory is that there are no *Noerr* problems associated with it. Even though the landlord did not petition the government for rent control, and the illegal combination occurs without the landlord's consent, there is still a sufficient basis for a violation of section one of the Sherman Act.

110. If there is an independent rent board, one could also avoid *Noerr* problems in this area by utilizing the "co-conspirator" exception to the *Noerr* doctrine, which states that activities of governmental officials are not protected if they conspire with private parties to harm competitors (landlords) of the petitioners (tenants). See *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975). A conspiracy could be established between rent board members or staff and tenants' rights advocates. Proof could be the divulging of information to tenants enabling them to sue their landlord or allowing tenants to use city computers to draft documents. One clear example, it seems, is in Santa Monica where the rent board legal staff was assisting a private tenant group in drafting a new rent control charter amendment initiative. Those on the rent board staff who were caught paid back their salaries for the time spent aiding the private group. That avoids, perhaps, liability for misuse of public funds, but a conspiracy to restrain rents is conclusively established between the rent board and private individuals.

111. This idea was first suggested by Jon D. Smock and Wilbur H. Haines, III, in their Supplemental Brief of Amicus Curiae California Apartment Association in Response to the Supreme Court's letter to Council of February 15, 1984. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984).

112. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960). "Illegal combination results where manufacturers refuse to deal with wholesalers in order to elicit their willingness to deny . . . products to retailers and thereby help gain the retailer's adherence to suggested minimum retail prices." *Id.* at 45.

113. 390 U.S. 145 (1968).

114. *Id.* at 150 n.6.

IV. STATE ACTION IMMUNITY: A WEAKENED MUNICIPAL DEFENSE AT THE CROSSROADS

A. History of the State Action Doctrine

In 1943, the United States Supreme Court held in *Parker v. Brown*¹¹⁵ that a California statute establishing state control over raisin production and wholesale prices upon petition and referendum of growers was immune from antitrust scrutiny. The Court examined the language and history of the Sherman Act but could "find nothing . . . which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."¹¹⁶

Almost thirty years after *Parker*, in *Goldfarb v. Virginia State Bar*,¹¹⁷ the Court held that state action immunity did not protect a minimum fee schedule enforced by the state bar association.¹¹⁸ The Court stated that the issue was "whether the activity is *required* by the State acting as sovereign."¹¹⁹ Noting that the fee schedule had merely been "prompted" by the state and not "compelled," the Court found no immunity from the proscriptions of the federal antitrust laws.¹²⁰

In *Bates and O'Steen v. State Bar*,¹²¹ the Court held immune from an antitrust challenge a disciplinary rule of the Arizona Supreme Court prohibiting advertising by attorneys. The Court found the rule to be an "affirmative command" of the state high court and thus "'compelled by direction of the State acting as a sovereign.'"¹²²

In *Cantor v. Detroit Edison Company*,¹²³ the Court made clear that it had "already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."¹²⁴ It further noted that mere regulation by the state, even if comprehensive, would not confer immunity from the

115. 317 U.S. 341 (1943).

116. *Id.* at 350-51. Actually, the seminal "state action" decision was probably *Olsen v. Smith*, 195 U.S. 332 (1904), in which the Supreme Court held that a Texas statute granting a steamboat pilotage monopoly did not violate the Sherman Act because to rule otherwise would undermine the state's authority to regulate. *Id.* at 344-45.

117. 421 U.S. 773 (1975).

118. *Id.* at 790.

119. *Id.* (emphasis added).

120. *Id.* at 791.

121. 433 U.S. 350 (1977).

122. *Id.* at 360.

123. 428 U.S. 579 (1976).

124. *Id.* at 592-93 (footnote omitted).

Sherman Act.¹²⁵

The latest pronouncement of the Court concerning a state's ability to confer antitrust immunity on a private party came in 1980 in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*¹²⁶ The Court condensed its prior decisions and announced a two-pronged test for immunity.¹²⁷ In addition, the Court found that a uniform price schedule mandated by state statute was not enough to confer immunity because the state did not "actively supervise" the essentially private conduct.¹²⁸

B. Application of the State Action Doctrine to Municipalities

The Court in 1978 reviewed a case in which a private utility company counterclaimed against a municipal utility, alleging antitrust violations. The immunity defense pleaded by the two cities that owned the utility was rejected by the Court. A four-justice plurality reasoned in *City of Lafayette v. Louisiana Power & Light Company*¹²⁹ that if cities were granted immunity coextensive with that of the states, "a serious chink in the armor of antitrust protection would be introduced"¹³⁰ The plurality made it clear that a municipality's activities would only qualify for immunity under *Parker* when "pursuant to state policy to displace competition with regulation or monopoly public service."¹³¹ The authorization from the state, however, need not be specific and detailed: "[A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'"¹³²

The Court went further toward lowering the barriers to suing a municipality in antitrust in *Community Communications Company v. City of Boulder*.¹³³ This case involved a cable television franchise's antitrust suit which sought to enjoin a city with home rule¹³⁴ powers

125. *Id.* at 597. "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" *Id.* (footnote omitted).

126. 445 U.S. 97 (1980).

127. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id.* at 105 (quoting *City of Lafayette*, 435 U.S. at 410) (plurality opinion).

128. 445 U.S. at 106.

129. 435 U.S. 389 (1978).

130. *Id.* at 408.

131. *Id.* at 413.

132. *Id.* at 415 (quoting the decision below, 532 F.2d 431, 434 (1976)).

133. 455 U.S. 40 (1982).

134. Home rule authority gives a city all of the state legislative power with respect to municipal affairs. See *Denver v. New York Trust Co.*, 229 U.S. 123 (1913).

from imposing a moratorium on expansion of cable television in the city. The city argued that the home rule provision contained in the state constitution conferred *Parker* immunity. The Supreme Court rejected this notion, finding that the Colorado Home Rule Amendment's "'guarantee of local autonomy'" did not provide the "'clear[ly] articulat[ed] and affirmative[ly] express[ed]'" state policy necessary to immunize the anticompetitive acts in issue.¹³⁵

Because *Midcal* involved a private defendant, the Court did not address whether the challenged ordinance could meet the second prong of the test announced in *Midcal*: active state supervision.¹³⁶ It is certain, however, that if "the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive" no state action immunity is conferred.¹³⁷

C. *The Future of the State Action Doctrine and Its Impact on Municipal Antitrust Liability*

The lower courts' interpretations of *Boulder* have been varied, but a pattern has appeared in favor of finding municipal immunity under a wide variety of circumstances.¹³⁸ These courts have inferred a state's willingness to accept the anticompetitive results of authorized municipal activities. This view of finding implicit state authority to

135. 455 U.S. at 54-56.

136. The plurality in *Lafayette* quoted the "active state supervision" language of *Bates*, but did not apply the test. 435 U.S. at 410. See Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 445 n.50 (1981).

137. *Id.* at 55 (emphasis in original).

138. See, e.g., *Tom Hudson & Assoc., Inc. v. Chula Vista*, 746 F.2d 1370 (9th Cir. 1984) (California law approved granting of exclusive trash collection contracts by municipalities); *Catalina Cablevision Ass'n v. Tucson*, 745 F.2d 1266 (9th Cir. 1984) (state of Arizona provided a clear and affirmative state policy to displace competition in the cable television industry); *Deak-Perera Hawaii, Inc., v. Department of Transp.*, 745 F.2d 1281 (9th Cir. 1984) (executive branch of Hawaii entitled to state action immunity in awarding of exclusive currency exchange concession at airport); *Springs Ambulance Serv., Inc. v. Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (three desert cities could provide free ambulance service, thereby displacing competition, because state statute so allowed); *Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) (state authorization to issue revenue bonds to fund a solid waste disposal site conferred immunity for anticompetitive actions required to market bonds); *Gold Cross Ambulance & Transfer v. Kansas City*, 705 F.2d 1005 (8th Cir. 1983) (immunity found by focusing on fact that *state* itself had regulated ambulance services in a manner that evidences an intent to displace competition); *Hopkinsville Cable TV v. Pennroyal*, No. 81-0270-P(G) (W.D. Ky. March 11, 1982) (state constitutional provision granting the municipality power to control and franchise utilities constituted clear articulation of state policy authorizing an exclusive franchise).

resort to violations of the Sherman Act in order to attain an explicit legislative goal seems to stretch *Boulder* beyond recognition.

The bounds of municipal antitrust immunity have been clarified greatly by the United States Supreme Court in its recent decision in *Town of Hallie v. City of Eau Claire*.¹³⁹ In that case, four Wisconsin townships sued an adjacent city that had the only sewage treatment facility available to the towns.¹⁴⁰ The city refused to supply sewage treatment services to the towns unless they agreed to annexation. There was no dispute that this conduct constituted an illegal monopoly; the issue was whether the city's conduct was exempt from the Sherman Act.

The court of appeals ruled in favor of the city, reasoning that "[i]f the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity."¹⁴¹ The court refused to apply the second prong of the test enunciated in *Midcal*: active state supervision.¹⁴²

On certiorari in the United States Supreme Court, the Court affirmed the decision of the lower courts, finding that immunity did attach.¹⁴³ The Court held that the Wisconsin statutes evidenced a clearly articulated state policy to displace competition with regulation in the area of municipal provision of sewage services.¹⁴⁴ The decision is important because it answers several questions that the *Boulder* Court left open.

First, the decision makes clear that state action immunity can exist even if the state legislature has not stated *explicitly* that it expects the municipality to engage in anticompetitive conduct.¹⁴⁵ The test is whether a state statute "has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects."¹⁴⁶ In the instant case, the Court found it sufficient that the state had authorized the defendant City to provide sewage services and to determine the geographical area it would serve.¹⁴⁷

Second, the Court dispelled the belief, held by hopeful plaintiffs' attorneys, that before the "clear articulation" requirement can be met by a defendant, it must show that the state "compelled" the act

139. 105 S. Ct. 1713 (1985).

140. *Id.*

141. 700 F.2d 376, 381 (7th Cir. 1983) (footnote omitted).

142. *Id.* at 383-84. The court expressed concern that if the active state supervision test were applied to cities, "[s]tates would be required to supervise all local actions" *Id.* at 384.

143. 105 S. Ct. 1713 (1985).

144. *Id.* at 1719.

145. *Id.* at 1718.

146. *Id.* at 1719.

147. *Id.* at 1718.

in question.¹⁴⁸ The Court pointed out that *Cantor*¹⁴⁹ and *Goldfarb*¹⁵⁰ were distinguishable because those cases concerned *private* parties, not cities.¹⁵¹ The Court reasoned that a municipality is an arm of the state,¹⁵² and that if it is acting pursuant to a clearly articulated state policy, nothing more need be shown "to prove that the challenged practice constitutes state action."¹⁵³

Finally, the Court held that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality."¹⁵⁴ It is in the discussion of this part of the decision that the Court, in dictum, leaves the judicial door open to an antitrust challenge to rent control. The Court stated that the active state supervision test will only apply to a private defendant, because "there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."¹⁵⁵ The Court reasoned that there was little chance of a municipality becoming involved in non-governmental activities. The Supreme Court did recognize, however, the danger that the municipality would "seek to further purely *parochial* public interests at the expense of more overriding state goals."¹⁵⁶ The Court thought this danger minimal, nevertheless, because of the "clearly articulated state policy" test.¹⁵⁷

The point is that rent control exists in fifty-one California municipalities without *any* state policy concerning rent control, and certainly nothing "clearly articulated." Parochial interests are served to the exclusion of the broader state interest in maintaining the supply of rental housing.¹⁵⁸ In fact, every time the California Legislature considers a bill to limit the "radical" rent control ordinances, the affected cities lobby heavily, stating that the state should stay out of lo-

148. *Id.* at 1720.

149. *See supra* text accompanying notes 123-25.

150. *See supra* text accompanying notes 117-20.

151. 105 S. Ct. at 1720.

152. *Id.*

153. *Id.*

154. *Id.* (footnote omitted).

155. *Id.*

156. *Id.* at 1721 (emphasis added).

157. *Id.*

158. The California legislature has expressed a policy in favor of the free market in housing:

The Legislature finds and declares that the subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of this state, for the following reasons:

(c) A healthy housing market is one in which residents of this state have a

cal affairs. Perhaps the time will come when these cities understand that they cannot maintain a price-fixing scheme in flagrant disregard of federal law without the protection of state concurrence.

Factually, the *Town of Hallie* decision has little in common with an antitrust suit attacking rent control. The Wisconsin case involved a section two (monopolization) violation, while rent control constitutes primarily a section one (restraint of trade) violation. The City of Eau Claire was acting pursuant to a clearly articulated state policy to displace competition; no such state policy exists in California with respect to rent control. Lastly, sewage treatment is a well-recognized, traditional function of local government, whereas only a very few cities nationally have ever placed ceilings on rent levels. *Town of Hallie v. City of Eau Claire* will perhaps make overcoming the state action immunity defense more difficult in many cases. It does not represent, however, a change in direction for the Court, but rather a clarification of earlier decisions.

D. Implications for Rent Control

The post-*Boulder* decisions taken together seem to suggest that courts are unwilling to attach antitrust liability to traditional municipal functions.¹⁵⁹ Where immunity claims have been rejected, it is usually because the city defendant fails to convince the court that the challenged activity is necessary to carry out a proper governmental function.¹⁶⁰

In *Mason City Center Associates v. City of Mason City*,¹⁶¹ a shopping mall developer challenged an agreement in which competing developers agreed to develop a downtown mall on the condition that the city block other developments. The court rejected the city's claim that the state's grant of zoning authority immunized its activities. The court noted that zoning was by nature anticompetitive but stated:

To say that the Iowa legislature may have foreseen that the zoning statute,

choice of housing opportunities and one in which the housing consumer may effectively choose *within the free marketplace*.

(d) A healthy housing market is necessary both to achieve a healthy state economy and to avoid an unacceptable level of unemployment.

CAL. HEALTH & SAFETY CODE § 50001 (West Supp. 1985) (emphasis added).

159. See, e.g., *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), cert. denied, 459 U.S. 872 (1983) (city immune in dealing with airport operators because activities were "public, governmental functions").

160. It should be recalled that Chief Justice Burger's crucial fifth vote in *Lafayette* depended on his view that the activity complained of was "not an integral operation in the area of traditional government functions." *City of Lafayette*, 435 U.S. at 424 (Burger, J., concurring) (citation omitted).

161. 468 F. Supp. 737 (N.D. Iowa 1979), aff'd, 671 F.2d 1146 (8th Cir. 1982). Accord *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), cert. denied, 103 S. Ct. 2122 (1983).

when otherwise properly applied by the municipalities, might result in anticompetitive effects is not to say that it therefore also affirmatively contemplated and approved direct anticompetitive activity violative of the federal antitrust laws.¹⁶²

Mason City indicates that perhaps the courts will not grant antitrust immunity to a city activity that constitutes, for example, a clear example of price-fixing.

For antitrust plaintiffs seeking to invalidate a rent control law, the state action exemption should not pose major problems. Rent control has not been "clearly articulated and affirmatively expressed" as state policy in California.¹⁶³ It is possible that a court could *judicially* find the requisite state policy in landlord/tenant legislation, housing statutes, or even in a court decision.¹⁶⁴ Nevertheless, such a judicial determination would violate the spirit of *Boulder* and *Lafayette* if not the letter of the law.¹⁶⁵

V. RECENT DEVELOPMENTS

A. Fisher v. City of Berkeley

The question of whether the Sherman Act preempts a local rent control ordinance by virtue of the supremacy clause¹⁶⁶ was raised on appeal in *Fisher v. City of Berkeley*.¹⁶⁷ The case involved a facial attack by plaintiff landlords on the Berkeley rent control scheme. The antitrust issue was raised by an amicus curiae for the plaintiffs during briefing in the California Supreme Court.¹⁶⁸ The majority's lengthy discourse on the issue, Chief Justice Bird's concurring opinion addressing whether the court should have entertained the issue,

162. 468 F. Supp. at 743 n.7.

163. California Government Code section 65589(b) provides that none of the accompanying statutes regulating housing elements are to be construed as affirming or denying a city's authority to impose rent controls. CAL. GOV'T CODE § 65589(b) (West 1983). This is obviously a neutral declaration concerning rent controls. See *Cantor*, 428 U.S. at 592-93.

164. However, the plurality in *Lafayette* only contemplated that the state policy would come from statutes showing that the "legislature contemplated the kind of action complained of." *City of Lafayette*, 435 U.S. at 415.

165. Currently pending in the California Legislature, Assembly Bill No. 483 (Costa), would mandate "vacancy decontrol of rents in all state localities with rent control laws." The bill does not express a state policy in favor of rent control.

166. U.S. CONST. art. VI, cl. 2.

167. *Fisher*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984).

168. The concurring opinion by Chief Justice Bird examines whether the court should have entertained the issue. *Id.* at 710-13, 693 P.2d at 312-15, 209 Cal. Rptr. at 733-35 (Bird, C.J., concurring).

and the fact that the dissent by Justice Lucas deals exclusively with the antitrust issue, reveal the importance of the matter.

The majority's analysis of the antitrust issues in *Fisher* was disappointing because it left unanswered the questions it could have explored and perhaps provided insight into, such as whether a conspiracy could be proved under the circumstances. The opinion begins with a discussion of the facial validity of the ordinance under section one of the Sherman Act.¹⁶⁹ One is alerted to the type of "question begging" in the majority's analysis when the court declares that "if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules."¹⁷⁰ This statement is valuable because it not only signals the court's decision on the antitrust issue, but informs the reader that if application of antitrust principles would invalidate the rent control ordinance, the court will elect not to use those principles. In other words, the court's actual discussion of the issues had to sidestep settled antitrust precedent to reach the desired outcome. Therefore, potential defendant municipalities should expect that plaintiffs will be encouraged to file suit in federal court.

The majority set forth the antitrust precedents in a straightforward, honest manner. In discussing the per se rule, the opinion states that if a combination's purpose is price-fixing, "[t]he machinery employed . . . is immaterial."¹⁷¹ It also correctly stated that "courts have mechanically declared such conduct illegal,"¹⁷² not caring whether consumers realized a net benefit. Given the obvious outcome of this line of reasoning when applied in the rent control context, the court then hastily retreated, stating that "[i]n our view, maximum rents price fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants."¹⁷³

The court quickly turned to the alternative: the Rule of Reason. Again, the court's summary of the state of the law was flawless, relating that the public welfare argument has been laid to rest and that now the proper inquiry is "the challenged restraint's impact on competitive conditions."¹⁷⁴ The court's departure from the law it had given was marked by its statement that "[a]s stated above, however,

169. *Id.* at 660, 693 P.2d at 275, 209 Cal. Rptr. at 696.

170. *Id.* at 664, 693 P.2d at 278, 209 Cal. Rptr. at 699.

171. *Id.* at 666, 693 P.2d at 279, 209 Cal. Rptr. at 700 (quoting *Socony-Vacuum Oil Co.*, 310 U.S. at 223).

172. *Id.*

173. 37 Cal. 3d at 670, 693 P.2d at 283, 209 Cal. Rptr. at 704 (footnote omitted).

174. *Id.* at 672, 693 P.2d at 284, 209 Cal. Rptr. at 705 (quoting *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 688 (1978)).

we will not mechanically apply to municipal defendants rules of law developed exclusively in the context of determining private business antitrust liability."¹⁷⁵

The court called for development of a public welfare defense to alleged antitrust violations by local governments.¹⁷⁶ It then completely scuttled eighty years of common law antitrust development and declared a new standard of liability "modeled after the [United States Supreme] court's commerce clause cases"¹⁷⁷ for judging a conflict between the antitrust laws and a municipal ordinance. The *fait accompli* occurred when the court discarded the cost-benefit balancing test used in commerce clause decisions.¹⁷⁸ The test proposed and utilized by the court states that a municipal regulation with a proper local purpose, rationally related to use of the police power, operating in an even-handed manner, will be upheld against an antitrust attack unless a method less intrusive on federal antitrust policies is proved by the plaintiff. The end result of the application of the court's test was a finding that plaintiffs had not established a conflict with the Sherman Act.¹⁷⁹

Justice Lucas' dissenting opinion bears noting, because at the time of oral argument in the *Fisher* case, he had only recently left the federal bench to accept a position on the state's highest court. His dissent concluded that "a municipality's participation . . . in a price-fixing scheme should not shield it from antitrust scrutiny,"¹⁸⁰ and therefore the ordinance was a per se illegal violation of the Sherman Act. Not only did Justice Lucas reach this conclusion, he went one step further and reached that rare plateau which many dissenters strive for but few obtain: he used the majority's own test to support his opinion. He gave the majority *three* less intrusive means to accomplish the goal of reducing rents.¹⁸¹ First, rent subsidies could be provided to those who deserve them. Second, the city could erect public housing projects. Third, the city could acquire property through negotiated purchase or condemnation. All three would avoid conflict with the Sherman Act and would spread the financial burden for low-income housing among *all* city taxpayers and not just owners of rental property.

175. *Id.*

176. 37 Cal. 3d at 673, 693 P.2d at 285, 209 Cal. Rptr. at 705.

177. *Id.* at 675, 693 P.2d at 286, 209 Cal. Rptr. at 707.

178. *Id.*

179. *Id.* at 678, 693 P.2d at 289, 209 Cal. Rptr. at 710.

180. *Id.* at 714, 693 P.2d at 315, 209 Cal. Rptr. at 736 (Lucas, J., dissenting).

181. *Id.* at 718, 693 P.2d at 318, 209 Cal. Rptr. at 739.

At the time of this article's printing, the United States Supreme Court granted certiorari in *Fisher*. This portends some direction from the Court concerning rent control's legality. Although one cannot predict whether the courts will focus upon the antitrust aspects of the case, this will be a topic of debate for years to come. It is likely that the *Fisher* decision will interest jurists for the simple reason that it represents an aberration: a state's highest court entering the heretofore exclusive realm of the federal judiciary and attempting to modify the established principles of antitrust law. It is an attempt that will be rejected as long as economists agree that the setting of maximum rent ceilings by the government is a disaster,¹⁸² and our courts uphold the idea that the operation of the free market will produce the greatest benefit for our citizenry.

B. The Local Government Antitrust Act of 1984

The Clayton Antitrust Act¹⁸³ provides that anyone who is injured by reason of a federal antitrust violation may sue in federal court and can recover treble damages and reasonable attorney's fees.¹⁸⁴ One of the greatest conceptual difficulties with the current rush to sue municipalities in antitrust is the potential for devastating damage awards. One public official's decision to award an exclusive contract, for example, could result in millions of dollars of damages being awarded against the city. The local taxpayers would then be forced to bear the burden of paying the award. This has led many legal scholars to believe that judges would simply be unwilling to award such damages,¹⁸⁵ the end result being that municipalities would be free to violate the antitrust laws.

There will be very little debate concerning this issue in the future because Congress has made an initial step toward resolving this issue by passing of the "Local Government Antitrust Act of 1984."¹⁸⁶ The statute provides that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. §§ 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity."¹⁸⁷ The implications in the rent control context are obvious. No monetary dam-

182. See, e.g., Rabin, *The Revolution in Residential Landlord-Tenant Law*, 69 CORNELL L. REV. 517 (1984).

183. 15 U.S.C. §§ 12-13, 14-21, 22-27 (1976).

184. *Id.* § 15.

185. Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395, 397-98 (1983). See, e.g., Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 BROOKLYN L. REV. 259 (1983); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979).

186. Pub. L. No. 98-544, 98 Stat. 2750 (1984).

187. *Id.* § 3(a).

ages or attorney fees may be recovered by the plaintiffs. Therefore, only injunctive relief¹⁸⁸ is available to those plaintiffs who had not filed by the effective date of the Act.¹⁸⁹

The passage of the Act should not be condemned by plaintiffs considering antitrust challenges to local rent control ordinances because money damages are not the central goal in such a suit. Rather, it is the invalidation of the offending law that is the aim, as it was in *Fisher*. Moreover, the "Local Government Antitrust Act" is important because of what it does *not* do. It does not grant local governments immunity from the federal antitrust laws. Implicit in this omission is the "green light" to plaintiffs who wish to seek injunctive relief against the anticompetitive conduct of local governments. Ostensibly, this includes the fixing of maximum rent ceilings by cities and counties.

VI. A LOOK TO THE FUTURE

There are several obstacles to proving an antitrust cause of action against a municipality that has imposed rent controls. Perhaps the most difficult will be finding a judge who is willing to preempt a city's entire rent control scheme. The federal courts have consistently validated legislative schemes for stabilizing prices on various commodities,¹⁹⁰ and it could be an arduous task to convince them that rent control is a per se violation of section one of the Sherman Act.

The plaintiff's main burden will be proving a conspiracy to violate the antitrust laws by restraining competition in the rental housing market. The most difficult hurdle will be the *Noerr* doctrine's exemption for political activity. As discussed in *Overton v. City of Berkeley*,¹⁹¹ a conspiracy among the tenants themselves or between the city and unwilling landlords would circumvent *Noerr* problems.

The state action exemption is less bothersome for now. Either the immunity exists or it does not. And, in California at least, there is no state policy in favor of rent control at the local level. If the state legislature does not enact a statute stating that rent control is the policy

188. Injunctive relief is provided for in the Clayton Act. See 15 U.S.C. § 26 (1976).

189. The Act provides that "[s]ubsection (a) shall not apply with respect to cases commenced before the effective date [September 24, 1984] of this Act." Pub. L. No. 98-544, § 3(b).

190. See *Nebbia v. New York*, 291 U.S. 502 (1934). The holdings in these cases were not based on antitrust grounds.

191. No. C843364SAW (N.D. Cal. filed May 31, 1984).

of the state, a rent control challenge on antitrust grounds not filed before that date would be dismissed.

A Sherman Act section two (monopolization) cause of action should also be pleaded. This avoids the conspiracy problem because a single entity may violate section two. It is doubtful that a court will find that any rent control agency has in fact "monopolized" a city's housing market. Strong evidence, however, should be presented on this issue, pointing out the fact that the local rent board does have the power to exclude competition. The "old" property owners, unable to obtain a return on their investment, are forced by the law to sell to "new" owners at a distressed price. Thus, the city becomes a partner of every buyer. There is usually little or no new construction in most rent controlled areas, even if the law exempts new housing from its operation. This also contributes to the city's monopoly power over rental housing.

The United States Supreme Court's decision in *Fisher* should contain many insights into the unanswered questions about local rent control laws' vulnerability to attack on federal antitrust grounds. The progress of the *Overton*¹⁹² antitrust challenge to Berkeley's rent control law will also be enlightening. The law in this area is evolving rapidly. For the time being, it is certain that the federal antitrust laws provide a viable avenue of attack against the economic debacle known as rent control.

192. *Id.*